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THE POTENTIAL PASSAGE OF PROPOSED SENATE BILL 147 AND ITS IMPLICATION ON NATIVE HAWAIIANS AND GAMING

Lindsay Goodner[*]

I. Introduction

Native Hawaiians comprise one of the few indigenous groups in the United States who are not deemed to be a sovereign, self-governing entity. Currently, "Congress strangely does not uniformly recognize Hawaiians as Native Americans who have a right to self-determination."[1] As a result, "many Hawaiians today advocate sovereignty from the United States, much like the sovereignty to which Native American tribes in the forty-nine states are entitled."[2] To address this issue of Native Hawaiian sovereignty, Senator Daniel Akaka (D.-Haw.) introduced a bill known as the Native Hawaiian Reorganization Act of 2005 (the Akaka Bill) in the first session of the 109th Congress.[3] Unfortunately, this past summer, the Akaka Bill did not receive enough support to make it to the Senate floor for a cloture vote, which would have "forced the Senate to decide whether it would take up the measure."[4] However, Senator Akaka has stated that he will reintroduce the bill in the now Democratic-controlled Congress.[5]

The Akaka Bill would require Congress to "recognize Native Hawaiians in the same manner it recognizes separate governments for American Indians and Alaska natives."[6] The purpose of the Akaka Bill is to provide a process that

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1. Annmarie M. Liermann, Comment, *Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of Hawaiians in Federal Native American Policy*, 41 SANTA CLARA L. REV. 509, 510 (2001).

2. *Id.*

3. S. 147, 109th Cong. (2005). During the 106th Congress, Senator Akaka introduced a previous version of this bill which received enough opposition to prevent is passage. Liermann, *supra* note 1, at 511. However, the opposition did not prevent Senator Akaka from receiving amended portions of the bill and reintroducing an amended version in the second session of the 109th Congress.

4. Gene Park, *Majority Power Gives New Hope for Akaka Bill*, HONOLULU STAR-BULL. NEWS, Nov. 10, 2006, *available at* http://starbulletin.com/2006/11/10/news/story04.html

5. *Id.*

6. John Fund, *Volcanic Politics*, WALL ST. J., July 18, 2005, *available at* http://www.

would allow the development of a Native Hawaiian governing entity to continue the previous government-to-government relationship with the United States.[7] The Akaka Bill proposes a reorganization and restructuring process that would enable "Native Hawaiian people to exercise their inherent rights as [the] distinct, indigenous, native community" that they are.[8] As a result of the passage of the Akaka Bill, Native Hawaiians would gain "their rights of . . . self-determination and self-governance."[9] By gaining this sovereign status and the ability to self-govern, Native Hawaiians would be able to enjoy "international independence and recognition as a political entity separate from United States control."[10] After gaining sovereign status, "the United States must afford Native Hawaiians the same privileges and immunities extended through federal recognition as they do other native peoples."[11] In particular, like American Indians, Native Hawaiians should have the privilege to establish gaming, and passage of the Akaka Bill would effectively change the current prohibition of establishing gaming in Hawaii.

Part II of this comment provides a brief overview of the history of Hawaiian sovereignty. Part III examines the Akaka Bill and how it provides a potential solution to Hawaii's sovereignty problem. In particular, Part III addresses the fears of many legislators who oppose the Akaka Bill because its passage would lead to gaming in Hawaii. Finally, Part IV describes the rise of Indian gaming operations and analyzes how sovereign status provides a loophole, which Indians have used to institute gaming and which Native Hawaiians could likely make use of as well.

II. Hawaii's Claim to Sovereignty - A Brief History

Within the United States there exists three indigenous populations: American Indians, Alaska Natives, and Native Hawaiians. While legitimate concerns exist regarding the implications of granting Native Hawaiians sovereignty, Native Hawaiians have a convincing claim to the sovereign status Congress has bestowed upon other indigenous peoples.

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opinionjournal.com/diary/?id=110006981.

7. S. 147, § 4(b).

8. *Id.* § 2.

9. *Id.*

10. Jennifer L. Arnett, *The Quest for Hawaiian Sovereignty: An Argument for the Rejection of Federal Acknowledgment*, 14 KAN. J.L. & PUB. POL'Y 169, 172 (2004).

11. Le'a Malia Kanehe, Recent Development, *The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 U. HAW. L. REV. 857, 895 (2001).

Like American Indians and Alaska Natives, the indigenous peoples of the Hawaiian Islands possess their own unique culture and historical customs which predate the founding of the United States and which include a "highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture and religion."[12] Currently, Congress does not generally recognize Hawaiians as having a right to self-determination, "despite their status as a formerly-sovereign, indigenous people who inhabit a current American state."[13] Even though Native Hawaiians share a similar history with Native Americans, "Hawaiians have never received the privileges of a political relationship with the United States."[14] This "lack of formal recognition of Native Hawaiians by the Federal Government . . . constitutes disparate treatment" because Native Hawaiians do not have the same rights and privileges that are granted to other indigenous groups.[15] This treatment "must be remedied without delay."[16]

The self-sufficiency and distinct characteristics of Hawaii's indigenous people were so apparent that, in 1826, the United States joined much of the rest of the world in recognizing the Kingdom of Hawaii as an independent and sovereign nation.[17] Because of this development, "from 1826 to 1883, Hawaii enjoyed fifty-five years of full diplomatic recognition from the United States, entering into treaties and conventions regarding commerce, navigation, and other foreign affairs."[18] In 1893, however, the Kingdom of Hawaiian ended.[19] With the force of its military troops, the United States overthrew the Hawaiian government, allowing for a U.S. controlled provisional government that sought annexation.[20] Following its annexation in 1893, "the [Kingdom of] Hawaii ceded nearly 1,800,000 acres of public lands formerly held in trust by the monarchy for the people of Hawaii to the United States, 'without the consent

12. *Id.* at 864 (quoting 100th Anniversary of the Overthrow of the Hawaiian Kingdom, S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993)).

13. Liermann, *supra* note 1, at 510.

14. Kanehe, *supra* note 11, at 857 (quoting HAWAII ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, A BROKEN TRUST: THE HAWAIIAN HOMELANDS PROGRAM: SEVENTY YEARS OF FAILURE OF THE FEDERAL AND STATE GOVERNMENTS TO PROTECT THE RIGHTS OF NATIVE HAWAIIANS 43 (1991)).

15. *Id.*

16. *Id.*

17. John Heffner, Note, *Between Assimilation and Revolt: A Third Option for Hawaii as a Model for Minorities World-Wide*, 37 TEX. INT'L L.J. 591, 595 (2002).

18. Arnett, *supra* note 10, at 169.

19. Heffner, *supra* note 17, at 595.

20. *Id.* at 596.

of or compensation to the Native Hawaiian people . . . or their sovereign government.'"[21] In addition to ceding control of tribal lands, Native Hawaiians surrendered their sovereignty, and as a result of becoming "the 'Fiftieth State,' the Native Hawaiian peoples were deprived of their right of self-determination."[22]

Since the fall of their monarchy and subsequent annexation, Native Hawaiians "have been struggling to regain their culture, recover their lands, and restore their sovereign nation."[23] "Native Hawaiians, descendants of the inhabitants of the Hawaiian Islands before the arrival of European explorers, consider themselves an indigenous people, yet they are not afforded the same federal recognition as [other native tribes such as] the Cherokee or Alaska natives."[24] "'Federal recognition' is a term used to describe the government-to-government relationship between the federal government and Native American governing bodies in a political relationship with the United States and those Indian tribes 'recognized' by the United States."[25] Among its benefits, "federal recognition allows indigenous people to exercise sovereignty through a separate governmental entity within the United States."[26] Native Hawaiians now seek federal recognition.[27]

Since the overthrow of their government, Native Hawaiians have continually been seeking "only what long ago was granted this nation's other indigenous peoples," - federal recognition as an indigenous group.[28] Although "[t]he United States . . . has granted Native Americans in forty-nine states the ability to be self-governing,"[29] Hawaii remains the only state with a native population that does not have this ability. The passage of the Akaka Bill, however, could return some degree of sovereignty to Native Hawaiians.

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21. Arnett, *supra* note 10, at 170 (quoting 100th Anniversary of the Overthrow of the Hawaiian Kingdom, S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993)).

22. R.H.K Lei Lindsey, Comment, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 U. HAW. L. REV. 693, 694 (2002).

23. Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 97 (1998).

24. Brian Duus, Recent Development, *Reconciliation Between the United States and Native Hawaiians: The Duty of the United States to Recognize a Native Hawaiian Nation and Settle the Ceded Lands Dispute*, 4 ASIAN-PAC. L. & POL'Y J. 469, 470 (2003).

25. Kanehe, *supra* note 11, at 861.

26. Duus, *supra* note 24, at 470.

27. *See Native Hawaiian Government Reorganization Act of 2005: Hearing on S. 147 Before the S. Comm. on Indian Affairs*, 109th Cong. *passim* (2005)[hereinafter *Hearing*].

28. *Id.* at 70.

29. Liermann, *supra* note 1, at 535.

III. The Akaka Bill

Along with nine co-sponsors, Hawaiian Senator Daniel Akaka (D.-Haw.) introduced Senate Bill 147, referred to as the Akaka Bill, on January 25, 2005.[30] The Akaka Bill, however, failed to gain traction in both the first and second sessions of the 109th Congress, but supporters plan to reintroduce the bill, yet again, in the 110th session of Congress.[31] The Akaka Bill originated from "Congressional recognition that Native Hawaiians are an indigenous people who merit the same treatment as other indigenous people in the United States."[32] If passed, the Akaka Bill would afford the Native Hawaiian people sovereign status and establish a process for Native Hawaiians to reorganize and reestablish a native government.[33] Because "Congress decides which indigenous governments merit federal recognition," the question of whether federal recognition should be extended to the Native Hawaiian people lies in the hands of Congress.[34] Due to the magnitude of this decision, the language and intent of the bill has become a focal point in the legislative discussion.

The Akaka Bill states:

> (19) this Act provides a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct, indigenous, native community to reorganize a Native Hawaiian governing entity for the purpose of giving expression to their rights as native people to self-determination and self-governance;
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> (20) Congress - (A) has declared that the United States has a special responsibility for the welfare of the native peoples of the United States, including Native Hawaiians; (B) has identified Native Hawaiians as a distinct group of indigenous, native people of the United States within the scope of its authority under the Constitution, and has enacted scores of statutes on their behalf; and (C) has delegated broad authority to the State of Hawaii to

30. S. 147, 109th Cong. (2005). The nine co-sponsors are: Sen. Maria Cantwell (D.-Wash.), Sen. Norm Coleman (R.-Minn.), Sen. Christopher Dodd (D.-Conn.), Sen. Byron Dorgan (D.-N.D.), Sen. Lindsey Graham, (R.-S.C.), Sen. Daniel Inouye (D.-Haw.), Sen. Lisa Murkowski (R.-Ark.), Sen. Gordon Smith, (R.-Or.), and Sen. Ted Stevens (R.-Ark.). GovTrack, http://www.govtrack.us/congress/bill.xpd?bill=s109-147 (last visited Jan. 6, 2006).

31. Liermann, *supra* note 1, at 511.

32. Duus, *supra* note 24, at 491-92.

33. S. 147, § 4(b).

34. Duus, *supra* note 24, at 478.

> administer some of the United States' responsibilities as they relate to the Native Hawaiian people and their lands. . . .
>
> . . . Native Hawaiians have--- (A) an inherent right to autonomy in their internal affairs; (B) an inherent right of self-determination and self-governance; (C) the right to reorganize a Native Hawaiian governing entity; (D) and the right to become economically self-sufficient.[35]

Therefore, passage of the Akaka Bill "would designate ethnic Hawaiians . . . as an 'indigenous people' comparable to American Indians and Alaska natives."[36] Upon federal recognition, Native Hawaiians would be treated similarly to other indigenous groups such as the Native Americans and Alaska natives. By gaining this federal recognition, Native Hawaiians would have the opportunity to re-establish themselves as a sovereign entity and become self-governing.[37] If absolute parity in the treatment of indigenous groups is to exist, however, "[t]he United States must afford Native Hawaiians the same privileges and immunities extended through federal recognition as they do to other native peoples."[38] Many critics of the Akaka Bill worry that granting Native Hawaiians the same privileges and immunities as other indigenous groups will open the door to gaming operations in Hawaii.[39]

In an effort to ease concerns regarding gambling operations spreading to Hawaii, the Akaka Bill contains language expressly forbidding gaming.[40] The section pertaining to Native Hawaiians and gaming explicitly states:

> (1) The Native Hawaiian governing entity and Native Hawaiians may not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission. (2) The foregoing prohibition in section 9(a)(1) on the use of Indian Gaming Regulatory Act and inherent authority to

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35. S. 147, § 2.

36. Ralph Z. Hallow, *Akaka Bill Seeks Ethnic-Hawaiian Government*, WASH. TIMES, May 30, 2005, *available at* http://washingtontimes.com/national/20050530-121542-6095r.htm.

37. Kanehe, *supra* note 11, at 863.

38. *Id.* at 895.

39. Ken Adams, *Bits and Pieces From Indian Country — July 2005*, CASINO CITY TIMES, Sept. 12, 2005, *available at* http://adams.casinocitytimes.com/articles/21946.html; Frank Oliveri, *Indian Tribes Raise Ante to Support Senator Inouye*, HONOLULU ADVERTISER, Aug. 29, 2004, *available at* http://the.honoluluadvertiser.com/article/2004/Aug/29/ln/ln01a.html.

40. *Hearing*, *supra* note 27.

> game apply regardless of whether gaming by Native Hawaiians or the Native Hawaiian governing entity would be located on land within the State of Hawaii or within any other State or Territory of the United States.[41]

Merely because the language of the Akaka Bill seems to indicate gaming would not be included in the rights and benefits of the newly formed government for the Native Hawaiians, however, does not mean Native Hawaiians would be unable to circumvent the intent of the provision and eventually establish gaming.

A. Opposition to the Akaka Bill — The Reasons for Republican Reluctance

The initial introduction of the Akaka Bill did not prove as promising as its supporters had hoped. After passing the U.S. House of Representatives, the bill died in the Senate because of significant Republican objections.[42] Republican opponents blocked the bill's passage largely because of concern that it was, in essence, "[a] federally sanctioned system of racial preference for Hawaiians."[43] Initial opposition toward the bill developed from the fear that passage of the bill would recognize Hawaiians as a race-based group rather than an indigenous group.[44] Republican Senator Jon Kyl, of Arizona, believed that the Akaka Bill created a race-based government. Expressing his concerns, Senator Kyl stated, "By creating a race-based government in the United States, we would be enhancing a trend toward the Balkanization of our culture."[45] Similarly, Bruce Fein, a constitutional lawyer and Department of Justice official in the Reagan administration, expressed his concerns by adding, "This bill is un-American in that it seeks to define citizenship based on race, rather than shared ideals."[46] Traditionally, however, tribes are not perceived as discrete racial groups; instead, tribes receive a special political status.[47] Opponents of the Akaka Bill see the bill as abandoning this traditional view, and have stated that passage of the Akaka Bill "would be the first time that we would actually be creating a race-based government entity within the United

41. S. 147, 109th Cong. § 9 (2005).

42. Liermann, *supra* note 1, at 511.

43. *Id.* at 533.

44. B.J. Reyes, *Akaka Bill Delays Underscore the Long, Bumpy Road Ahead*, HONOLULU STAR-BULL. NEWS, July 24, 2005, *available at* http://starbulletin.com/2005/07/24/news/story3.html.

45. Hallow, *supra* note 36.

46. *Id.*

47. Heffner, *supra* note 17, at 604-05.

States."[48] Creating a race-based government differs from any other tribal recognition because "[f]ederal recognition works via a fundamental change in the United States' perception of the members of indigenous governments; they are no longer regarded as a racial class, but instead acquire a special political status."[49] As a result, opponents fear that this race-based government would cause differing treatment of Native Hawaiians and indigenous peoples because other indigenous groups are not race-based groups but instead are political groups.

In addition to objections over the creation of a race-based government, some opponents of the Akaka Bill saw other grounds on which to oppose the bill, namely, the potential for gaming operations in Hawaii.[50] These opponents fear that once Native Hawaiians receive federal recognition, the Native Hawaiians will proceed with legal maneuverings to circumvent the express language in the bill forbidding gaming.[51] Many opponents believe the language of the bill is vague enough that, once passed, the gaming provisions will be open to interpretation.[52] As a result, they fear that passage of the bill would provide an opening which would ultimately be exploited for the purpose of bringing legalized gaming to Hawaii.

One critic of the Akaka Bill is Nevada Senator John Ensign.[53] In fact, Senator Ensign led the charge to prevent passage of the Akaka Bill.[54] Senator Ensign, along with other lawmakers who oppose the Akaka Bill, wants to ensure that the Akaka Bill will not enable the establishment of Hawaiian casinos.[55] Ensign expressed fears that "Native Hawaiians would purchase mainland property and use claims of sovereignty to establish gaming establishments," just as "[s]ome American Indian tribes, who enjoy similar sovereignty, have used 'off-reservation' procedures to expand their gaming reach."[56] Consequently, Ensign wants to ensure the strict enforcement of the language of the Akaka Bill expressly forbidding any establishment of gaming. Although the bill currently contains an anti-gaming provision, Ensign feels

48. Hallow, *supra* note 36.

49. Duus, *supra* note 24, at 478.

50. Adams, *supra* note 39; Oliveri, *supra* note 39.

51. *Id.*

52. James I. Kuroiwa, Jr., *Native Hawaiians Seek Self-Governing Body (Akaka Bill Will Have Negative Impact on Hawaii)*, HAW. REP., Aug. 17, 2005, *available at* http://www.free republic.com/focus/f-news/1465591/posts.

53. Adams, *supra* note 39.

54. *Id.*

55. *Id.*

56. *Id.*

that the language is not enough, stating that the current language forbidding gaming is "too loose" and "leaves a door open to potential gaming."[57]

The author of the bill, Senator Daniel Akaka, claims that these fears are unfounded and reiterated that stating, "All [the] bill does is clarify the political and legal relationship between native Hawaiians and the United States, thereby establishing parity in the federal policies towards American Indians, Alaska natives and native Hawaiians."[58] Passage of the Akaka Bill would result in recognition of Native Hawaiians as an indigenous group, thus allowing them to be self-governing.[59] This result is indicated by the express language of the bill discussed previously. Would self-governance, however, open the door to gaming operations?

B. How the Gaining of Federal Recognition Is Viewed as Being One Step Closer to Gaming

Currently, Hawaii and Utah are the only two states that do not permit some form of gaming.[60] While federal recognition may not enable gaming outright, federal recognition would undoubtedly be a significant step towards that end, despite language in the Akaka Bill prohibiting such action. The Akaka Bill explicitly states that

> the Native Hawaiian governing entity and Native Hawaiians may not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act or under any regulations there under promulgated by the Secretary or the National Indian Gaming Commission.[61]

Although the Akaka Bill clearly expresses that it does not authorize gaming for federally recognized Native Hawaiians, nothing in the Akaka Bill explicitly prohibits gaming either. Therefore, even though the Akaka Bill does not extend Indian gaming privileges to Hawaiians, the new governmental authority that the Akaka Bill helps to establish could later seek gambling authorization. Jacqueline Johnson, the executor director of the National Congress of

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57. Benjamin Grove, *Ensign Aims to Keep Casinos from Native Hawaiians*, LAS VEGAS SUN, July 20, 2005, *available at* http://www.lasvegassun.com/sunbin/stories/text/2005/jul/20/519079377.html.

58. Hallow, *supra* note 36.

59. Kanehe, *supra* note 11, at 863.

60. Ronald J. Rychlak & Corey D. Hinshaw, *From the Classroom to the Courtroom: Therapeutic Justice and the Gaming Industry's Impact on Law*, 74 MISS. L.J. 827 (2005).

61. S. 147, 109th Cong. § 9 (2005).

American Indians, stated that the possibility may exist for Hawaiians to establish gaming by doing just that.[62] Johnson demonstrated a method by which gaming could in fact become a reality in Hawaii, provided that the following actions first occur: "Native Hawaiians must win federal recognition and the Hawaii Legislature must act to permit gaming in the state. Then Native Hawaiians would have to secure lands and Congress might need to amend the Indian Gaming Regulatory Act to include Native Hawaiians."[63] Thus, this presents one way of demonstrating that if Native Hawaiians are able to gain federal recognition, gaming may not be too far behind.

Recent history has shown that even the piecemeal process outlined by Johnson may be unnecessary. Texas and California have seen Native American tribes open gambling casinos despite state laws prohibiting such operations.[64] In spite of laws forbidding gaming, the Tigua Indians opened a casino in Texas, in 1999, and the Alabama-Coushatta tribe followed suit two years later.[65] Similarly, in California, "Native Americans in that state spent tens of millions of dollars to lobby for passage of two propositions, the last amending the state constitution to allow for casino gaming long after casinos were built and operating."[66] These examples show that despite state laws clearly prohibiting gaming, tribes have found ways to circumvent this express language.

Given the brazenness with which gaming proponents have attacked, exploited, and, at times, disregarded laws prohibiting gambling operations, some members of Congress feel the best way to prevent future expansion of such operations to Hawaii is to deny native Hawaiians the sovereignty they seek in the Akaka Bill. In other words, the best way to prevent gambling from coming to Hawaii is to "prevent passage of the Akaka Bill because the whole point of creating an ethnic Hawaiian government is to give them sovereignty. And once they have sovereignty, they can do whatever they want, whenever they want."[67] These fears are fueled by the template that already exists for implementing gaming. Just as Native Americans used their sovereign status as a foundation for gambling operations, opponents feel that the establishment of an independent and sovereign government would allow Native Hawaiians to backdoor their way into casino operations.

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62. Oliveri, *supra* note 39.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

IV. Native Americans and Sovereignty - A Template for Hawaiian Gaming

Like the Akaka Bill, the original statutes granting federal recognition of Indian tribes contained no provisions explicitly permitting the establishment of gaming operations on tribal lands, but federal recognition paved the way for future gaming.[68] Federal recognition, and the all-important sovereignty that accompanied it, served as the catalyst that eventually led to the emergence of gaming on Indian tribal lands and, what opponents of the Akaka Bill fear, would ultimately lead to gambling in the Hawaiian Islands.[69]

Federal recognition and sovereignty have combined with a number of other factors to increase the attractiveness of gaming to Indian tribes. For example, "[m]any tribes, in the face of severe economic difficulties, have turned to gambling as a means of improving their economic well-being."[70] The promises of monetary windfalls for struggling Indian tribes added to the allure of legalized gaming. Gaming was touted as an economic cure-all for the seemingly perpetual cycle of dependency and poverty that afflicted many Indian tribes. Likewise, when compared to other Hawaiians, "Native Hawaiians suffer from the worst statistics on social indicators . . . [as] native Hawaiians have the highest rates of breast cancer, the highest rates of adult and juvenile incarceration, and one of the lowest rates for attaining college degrees."[71] Therefore, many Hawaiians would likely accede to the general Native American view that gaming is the most efficacious tribal strategy for economic bootstrapping.[72] As a result, when confronted with the desire or need to increase economic gains and decrease social problems in recent years, Indian tribes have looked increasingly to the gaming industry.[73]

Indian gaming began to be perceived not only as the solution to the tribes' economic dilemma, but also as "the vehicle that would restore to them their beloved sovereignty."[74] All the while, the vehicle used to advance the gaming

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68. Matt Kitzi, *"Miami County Vice" & "Why Not the Wyandottes?": Two Tales of the Struggle to Bring New Indian Gaming Facilities to Kansas*, 68 UMKC L. REV. 711, 714 (2000)

69. *Id.*

70. Mark C. Wenzel, Note/Comment, *Let the Chips Fall Where They May: The Spokane Indian Tribe's Decision to Proceed with Casino Gambling without a State Compact*, 30 GONZ. L. REV. 467, 473 (1995).

71. Lindsey, *supra* note 22, at 694.

72. Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native America Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 396 (1997).

73. *Id.*

74. Cynthia A. De. Silvia, Comment, *Waging the Wager War: Tribal Sovereignty, Tribal*

movement was that of Indian sovereignty. "[S]overeignty is now the key element in Indian gaming that has led to positive improvements in Native American poverty and social status."[75] The result has been renewed economic investment and growth.

Sovereignty was the tool used to help launch the Indian gaming phenomenon.[76] The establishment of gambling centers on tribal lands was an act conceived out of need and born of opportunity.[77] "Correlating with the emergence of gambling as a major entertainment option in the 1960's and 1970's was the reemergence of Native American sovereignty, and the two factors combined to bring gambling to the tribal reservation."[78]

Supporters of tribal gaming used the sovereignty provision to help establish legalized gambling by exploiting a loophole in the system available only to Indians as sovereign, indigenous peoples.[79] Under the guise of federalism, the federal government "leaves the bulk of gaming regulation to the states."[80] The states, however, "due to Indian tribal sovereignty, generally cannot control affairs taking place on the reservation, and thus the sovereign-status loophole for Indian gaming is established."[81] As stated earlier, the federal government has deferred the right to regulate gaming to the states, yet the federal government has also created a sovereign entity, which is not subservient to the states. As a result, once sovereignty has been established, gaming often soon follows. Recent history has shown that, "[u]sing this sovereignty, Indian tribes are able to escape most prohibitions or regulations a particular state may place upon gaming."[82] Given the economic benefits of gaming, and the inability to effectively regulate it due to the tribes' sovereign status, a number of native tribes and indigenous peoples, who have not previously been recognized by the federal government, have begun to lobby Congress for sovereign status. Among those most vociferously seeking sovereignty are Native Hawaiians.

Gaming, and California's Proposition 5 And Chapter 409, 30 MCGEORGE L. REV. 1025, 1048 (1999).

75. Kitzi, *supra* note 68, at 714.
76. *Id.* at 714-15.
77. *Id.* at 714.
78. *Id.* at 716.
79. *Id.* at 715.
80. *Id.*
81. *Id.*
82. *Id.*

A. Indian Sovereignty as a Vehicle for Instituting Gaming

For supporters of gaming, the reason for supporting federal recognition of Native Hawaiians is quite clear. Once sovereignty has been established, supporters are likely to pursue various legal avenues in an effort to legalize gambling. The template for such behavior already exists because of Indian attempts to establish gambling facilities on their tribal lands.[83] In light of these attempts, one thing is abundantly clear: "sovereignty is now the key element in Indian gaming."[84]

The road to sovereignty for indigenous peoples extends well into the annals of American legal history and much of the instability that continues to exist stems from the inconsistency with which courts have ruled on such issues. Federal law regarding the treatment and privileges afforded to Indians "has one of the most inconsistent histories of any area of American law."[85] American courts have added to this instability by vacillating from "adopting policies that favor Indian tribes to policies that work to abolish the tribal system altogether and back to policies that favor Indian tribes."[86] As a result, Indian law has a somewhat muddled history, full of contradictions and excessive statutory language. However, one thing is clear: "the United States government has alternately trampled the sovereignty and self-determination rights of indigenous groups located throughout its territory and attempted to encourage tribal growth and development."[87] In an effort to reacquire some of these rights, many native peoples have petitioned the government for special status. The Native Hawaiians' effort to obtain federal recognition provides one such example. If history is any guide, this push for sovereignty could have dramatic effects on the future of gaming in Hawaii, especially in light of the path that Native Americans have blazed in securing sovereign status for indigenous peoples.

The benefits of federal recognition for indigenous peoples, and the gaming rights that would eventually accompany such recognition, were not born overnight but were the result of many cases and years of continuous litigation. In a series of cases known as the Marshall Trilogy,[88] the Supreme Court

83. *Id.*

84. *Id.* at 714.

85. Arnett, *supra* note 10, at 173.

86. *Id.*

87. *Id.*

88. Duus, *supra* note 24, at 477. Three cases make up the Marshall Trilogy: *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831),

established the federal government's relationship to indigenous groups, recognizing "the right of indigenous peoples within its borders to exercise sovereignty through separate governments."[89] In *Johnson v. M'Intosh*,[90] basing its holding on the doctrine of discovery, the Court held that title to land conveyed by tribal Indians to non-Indians was not entitled to federal recognition.[91] This doctrine gave title to those who first discovered the land and established that only the discoverer had the right to acquire native lands.[92] Another case, *Cherokee Nation v. Georgia*,[93] served to define the status of Indian tribes.[94] The Supreme Court agreed that the Cherokee Nation was "a state, . . . a distinct political society, separated from others, capable of managing its own affairs and governing itself."[95] *Cherokee Nation* articulated that land conveyed to Indian tribes was, in fact, entitled to federal recognition and characterized the status of Indian tribes as "domestic dependent nations."[96] As Chief Justice Marshall wrote, the tribes "occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[97] Similarly, in *Worcester v. Georgia*,[98] Chief Justice Marshall opined that, "treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states . . . The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force."[99] With these cases, the foundations for the sovereign status of indigenous peoples were born.

Under the Marshall Trilogy, indigenous governments are deemed entities entitled to a constrained sovereignty, barring select limitations from the watchful eye of the federal government. In essence, "[t]aken together, these three cases stand for the proposition that tribes are not entitled to sovereignty in the traditional sense of the word, but, as domestic dependent nations, are

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and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

89. Duus, *supra* note 24, at 477.
90. 21 U.S. (8 Wheat.) 543 (1823).
91. *Id.* at 598.
92. *Id.* at 573.
93. 30 U.S. (5 Pet.) 1 (1831).
94. *Id.*
95. *Id.* at 16.
96. *Id.* at 17.
97. *Id.*
98. 31 U.S. (6 Pet.) 515 (1832).
99. *Id.* at 520.

afforded only limited sovereignty subject to the 'ultimate domain' of the federal government."[100] As such, indigenous governments wield sovereignty as it pertains to their relationships with other states and other governments but remain subordinate to the federal government. Marshall's opinions, however, helped to establish "the beginnings of a system wherein indigenous governments function similarly to 'states,' distinctly independent from other state governments, yet still subject to the plenary authority of the federal government."[101] As a result, Congress has exercised its ability to extend federal recognition and, hence, limited sovereignty, to the governments of some 550 groups of indigenous peoples.[102] In so doing, the federal government essentially left tribal governing structures intact while limiting the tribes' power and land base.[103]

"Native American gaming privileges are borne in great part out of the sovereign status afforded the American Indian Tribe."[104] It is the broad range of privileges and immunities extended through federal recognition which make federal recognition so valuable and sought after by indigenous people. The manner in which Native American tribes have used sovereign status to enact gaming is relatively simple:

> Using this sovereignty, Indian tribes are able to escape most prohibitions or regulations a particular state may place upon gaming. The federal government has relatively few laws that regulate non-Indian gaming, and leaves the bulk of gaming regulation to the states. The states, of course, due to Indian tribal sovereignty, generally cannot control affairs taking place on the reservation, and thus the sovereign-status loophole for Indian gaming is established.[105]

If sovereignty is granted to Native Hawaiians, they should follow the lead of their Indian brethren and "continue to argue, as they have since the beginning of Indian gaming, for maximum control over their own affairs."[106] As a result, Native Hawaiians, like Native Americans, may quickly adopt the view that

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100. Rand & Light, *supra* note 72, at 388-89.

101. Duus, *supra* note 24, at 477-78.

102. *Id.*

103. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 583 (1996).

104. Kitzi, *supra* note 68, at 714.

105. *Id.* at 715.

106. Stephanie A. Levin, *Betting on The Land: Indian Gambling and Sovereignty*, 8 STAN. L. & POL'Y REV. 125, 130 (1997).

gaming is "[o]ne more arena in which they, as sovereign nations, should be free to manage their own affairs, unimpeded by either state or federal oversight."[107] It is for this distinct reason that many legislators have reservations about granting recognition of sovereignty to another indigenous group.

B. Native Hawaiians Should Receive Federal Recognition and Be Entitled to the Same Privileges and Benefits as Other Indigenous Groups

Much of the contention regarding the Akaka Bill arises from the contradictory nature of competing ideals which the bill's passage would bring to the forefront. For example, should Congress right a perceived wrong by restoring Native Hawaiian sovereignty if such restoration means exposing the island to what many feel is the corrupt world of gambling? Similarly, should Congress grant Native Hawaiians sovereignty, yet hold Native Hawaiians to more burdensome laws than other indigenous peoples? Such questions regarding Native Hawaiian sovereignty pose ethical dilemmas for many lawmakers. What is clear, however, is the strength and legitimacy of Native Hawaiians' claim to the sovereignty which they seek.

The Akaka Bill states:

> (21) the United States has recognized and re-affirmed the special political and legal relationship with the Native Hawaiian people
>
> (22) the United States has continually recognized and reaffirmed that--
>
> (A) Native Hawaiians have a cultural, historic, and land-based link to the aboriginal, indigenous, native people who exercised sovereignty over the Hawaiian Islands;
>
> (B) Native Hawaiians have never relinquished their claims to sovereignty or their sovereign lands
>
> (C) the United States extends services to Native Hawaiians because of their unique status as the indigenous, native people of a once sovereign nation with whom the United States has a political and legal relationship; and
>
> (D) the special trust relationship of American Indians, Alaska Natives, and Native Hawaiians to the United States arises out of their status as aboriginal, indigenous, native people of the United States[108]

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107. *Id.*

108. S. 147, 109th Cong. § 2 (2005).

This language demonstrates that, in fact, the United States recognizes that Native Hawaiians are the native people of Hawaii and were previously sovereign.[109] Further, the United States realizes that Native Hawaiians are similar to other indigenous groups, like American Indians and Alaska Natives, who are sovereign and have a special political relationship with the United States.[110] Yet, Native Hawaiians are not able to enjoy the same benefits and privileges that those other indigenous groups do because Native Hawaiians are neither sovereign nor do they have that special political relationship with the United States.[111] So, what makes Native Hawaiians any different than these other indigenous groups, and why are they excluded from obtaining the same privileges and benefits? Native Hawaiians lack federal recognition.

Native Hawaiians should receive federal recognition and be considered an Indian tribe for five reasons: their history and experience is analogous to that of Indian tribes, the Framers' view, former sovereignty, effective congressional recognition, and their status at the time of the revolution.

The first reason Native Hawaiians should be entitled to the same recognition as other indigenous people is due to the similarity of their status to that of Indian tribes. "[T]he history and experience of Native Hawaiians and Indian tribes are constitutionally analogous, and thus their constitutional status should be the same as well."[112] Because the histories of Native Hawaiians and Indians are so similar, one can argue that "it would be inappropriate for a court to analyze statutes benefitting Indian tribes differently from those benefitting Native Hawaiians."[113] Many proponents of the Akaka Bill argue that federal recognition of Native Hawaiians, or Hawaiian independence in a relationship with the United States government, would be similar to mainland Native American tribes.[114]

In addition, the Framers of the Constitution would likely agree that Native Hawaiians fall within their definition of a tribal group or Indian tribe.[115] This is especially clear when "considering the term 'Indian' was originally a European mistake used to describe indigenous peoples who should be known instead by names such as Cherokee, Jicarilla Apache, or Mashantucket

109. Liermann, *supra* note 1, at 510.
110. Kanehe, *supra* note 11, at 895-96.
111. *Id.*
112. Benjamin, *supra* note 103, at 581-82.
113. *Id.* at 582.
114. Arnett, *supra* note 10, at 171.
115. Duus, *supra* note 24, at 490.

Pequot."[116] Similarly, "support for the view that the framers thought of Native Hawaiians as 'Indian Tribes' is found in the logs of Captain Cook, a contemporary of the framers, who repeatedly referred to the indigenous people he encountered in the Hawaiian Islands as 'Indians.'"[117]

The Framers argued those who belonged to tribes included all indigenous people who governed land prior to its acquisition by the United States.[118] Therefore, "Hawaiians are the people indigenous to the Hawaiian Islands. Furthermore, like Native Americans on the mainland, they enjoyed a sovereign existence prior to American conquest."[119] By this logic, Hawaiians should be included in the federal definition of Native Americans and, consequently, should be entitled to all rights and privileges enjoyed by other indigenous groups.

Another argument Native Hawaiians employ to bolster their fight in support of federal recognition is that of prior sovereign rule. This argument recognizes that "[l]ike Native Americans on the mainland, Hawaiians resided as a 'highly organized' nation before the overthrow of their government."[120] Also, during this time, "Hawai'i negotiated treaties with other nations, and the Hawaiian Kingdom had gained recognition as a distinct sovereign entity."[121] Some feel it is only fitting that Hawaii be able to reclaim a portion of the sovereignty stripped from them by the interference of another government. "To exclude Hawaiians as a sovereign nation upon American infiltration would be preposterous, as that would allow the United States to use unconstitutional methods to infiltrate the governing bodies of native people, then declare them to be non-sovereign precisely because of that unconstitutional activity."[122]

Because of the unique status of Native Hawaiians as the indigenous people of a once sovereign nation, Congress has also affirmed its belief that "the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives."[123] This recognition is merely an extension of legal and historical precedent.

> [I]n the 1934 Indian Reorganization Act, Congress decreed that "[f]or the purposes of said sections [regarding membership in

116. *Id.*
117. *Id.*
118. *Id.*
119. Liermann, *supra* note 1, at 536.
120. *Id.* at 538.
121. *Id.*
122. *Id.*
123. Duus, *supra* note 24, at 492.

> "Indian Tribes"], Eskimos and other aboriginal peoples of Alaska shall be considered Indians," despite the fact that Eskimos are "linguistically, culturally, and ancestrally distinct from other American 'Indians.'" Therefore, if Congress included Alaska natives within the meaning of the term "Indian Tribes," and explicitly stated Native Hawaiians have a political status comparable to Alaska natives, extending federal recognition to a [Native Hawaiian Nation] through the Akaka Bill would be a rational decision supported by well-developed legal history, within Congressional authority, and constitutional.[124]

Likewise, not only should Native Hawaiians be considered Native Americans because of the intent of Congress and the authors of the Constitution, but, "Hawaiians are literally Native Americans," who, as a people, "resided in this country in 1778 when non-natives 'discovered' the land."[125] Prior to this time, "Hawaiians alone lived in the Hawaiian Islands," thus allowing for natives to develop a distinct culture and way of life.[126] In *Naliielua v. State of Hawaii*,[127] the Supreme Court of Hawaii agreed with this logic by noting, "Native Hawaiians are people indigenous to the state of Hawaii, just as American Indians are indigenous to the mainland United States."[128]

The ability to formally and exclusively declare Native Hawaiians a distinct people with sovereign rights ultimately lies with the Congress of the United States.[129] Congressional legislation has all but done so in previous years, as illustrated in *Ahuna v. Department of Hawaiian Home Lands*.[130] In *Ahuna*, the Supreme Court of Hawaii noted that Congress had included Hawaiians in its definition of Native Americans in the American Indian Religious Freedom Act.[131] As a result, many feel it is only a matter of time before Congress officially recognizes Native Hawaiians as an indigenous people with sovereign rights - a step that could soon thereafter translate into gaming.

Once Native Hawaiians enjoy sovereign status, they are likely to demand the full rights offered to other indigenous groups. By not affording Native

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124. *Id.*
125. Liermann, *supra* note 1, at 537.
126. *Id.*
127. 795 F. Supp. 1009 (D. Haw. 1990).
128. *Id.* at 1013.
129. Liermann, *supra* note 1, at 537.
130. 640 P.2d 1161 (Haw. 1982).
131. *Id.* at 1169.

Hawaiians these same privileges, "the new independent and sovereign entity will point out that it would be inequitable and perhaps unconstitutional not to give it and its members the same status and privileges that all other tribes enjoy."[132] In other words, in designating a group of people based on race, it would be illegal to deny them rights granted to other peoples because of that race. However, based on the overwhelming similarities between Native Hawaiians and other Native American groups, it is difficult to establish a case for why Native Hawaiians should not receive the same benefits and privileges as other indigenous groups. Among these benefits and privileges is the right to establish gaming.

V. Conclusion

The potential passage of the Akaka Bill presents the possibility of significant consequences to the current prohibition of gaming in Hawaii. While the potential passage of this bill presents an opportunity for Native Hawaiians to backdoor their way into casino operations, this line of reasoning alone should not prevent the passage of the Akaka Bill. Native Hawaiians are considered one of the indigenous groups of people in the United States and as such, they should be treated accordingly. This means Native Hawaiians should have the ability to be sovereign and self-governing just like other indigenous groups. For this to happen, the Akaka Bill must pass. The potential consequences of the Akaka Bill should not prevent it from passing and granting Native Hawaiians what they deserve — status as a sovereign entity.

132. Paul M. Sullivan, Killing Aloha 57 (Feb. 2005), *available at* http://www.angelfire.com/hi5/bigfiles2/AkakaSullivan012505.pdf.